IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1163 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHAHEJAD RASHIDBHAI ANSARI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR S.R. DIVETIA FOR MR RAJESH M AGRAWAL for Appellant(s) : 1,
MR K.T. DAVE ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date :7/12/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. Challenge in this appeal filed under section 374 (2) of the Code of Criminal Procedure ('the Code' for short) is to the correctness of the judgment and order dated 11.7.2003 rendered in Sessions Case No.255 of 2002 by the learned Additional Sessions Judge, Court No.6, City Sessions Court, Ahmedabad City, by which the appellant ('accused' for short) has been convicted for commission of the offences punishable under Section 8 (c) read with Section 20 (b) (ii) and under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short) and sentenced to suffer R.I. for ten years and fine of Rs.50,000/- i.d., R.I. for 1½ months for commission of the offence punishable under Section 20 (b) (ii) of the NDPS Act and also R.I. for ten years and fine of Rs.50,000/- i.d., R.I. for 1½ months for commission of the offense punishable under Section 22 of the NDPS Act. It has been also ordered that both the sentences shall run concurrently.

2. Since the facts of the case have been detailed in the judgment of the learned Additional Sessions Judge, City Sessions Court, Ahmedabad City, it is not necessary for us to repeat the same all over again in verbatim and in detail in this judgment. However, the basic facts which are necessary to be discussed in this appeal are as under:

2.1. P.W.2, Dilip Shantilal Mehta, Senior P.I. of Kalupur Police Station, Ahmedabad City, has received a secret information on 15.9.2002, at about 10.15 hours, to the effect that two persons coming from S.T. Road and passing through Sarangpur Circle possess contraband article charas illegally without any pass or permit. The secret information stipulated the identity of both the persons who would be coming with contraband article charas. The said secret information was reduced into writing which was conveyed to his official superior and on the

basis of the said secret information, he arranged for raid. He, therefore, called two panchas and informed about the said secret information to the panchas as well as to the police personnel who would be the members of the raiding party and accordingly the first part of the panchnama was drawn. Thereafter he along with the raiding party and panchas went to the place as per the description and he intercepted two persons satisfying the descriptions given in the secret information and during search on them contraband article charas was recovered from a hand bag from the accused herein. Prior to the search and seizure, he also followed the statutory requirements contained under Section 50 of the NDPS Act by asking them as to whether they would like to be searched in presence of a gazetted officer or a magistrate saying that it was their right to be searched in presence of a gazetted officer or a magistrate under Section 50 of the NDPS Act, if they so desired, arrangement would be made to procure presence of a gazetted officer

or a magistrate. But both the said persons did not exercise that right and they allowed the search to be carried out by P.W.2. P.W.4, Ghanshyam Chhaganlal Soni, who is a goldsmith, was called for weighing the contraband article recovered from the accused and after weighing the contraband article, it was found that it was weighing 750 grams. Thereafter necessary formalities of sealing was done in presence of panchas and members of the raiding party and after completing the raid, he lodged complaint before Kalupur Police Station against both the accused persons for commission of the offences punishable under sections 8 (c), 20 (b) (ii), 22 and 29 of the NDPS Act.

2.2. P.W.2, Dilip Mehta, in compliance of the provision contained under the NDPS Act, informed his official superior about the successful carrying out of the raid. Thereafter investigation was handed over to P.W.8, Hariharbhai Lalshankar Jani. During the course of

investigation, he arranged to forward the muddamal to FSL for analysis and recorded the statements of the members of the raiding party. On receipt of the report from the FSL certifying that the muddamal sent for analysis was charas and as incriminating evidence was found against both the accused persons, they were charge-sheeted before the City Sessions court, Ahmedabad for commission of the offences punishable under sections 8 (c), 20 (b) (ii), 22 and 29 of the NDPS Act.

2.3. The learned Additional Sessions Judge, City Sessions Court, Ahmedabad, to whom the case was made over for trial, framed charge against the accused persons for commission of the offences punishable under Sections 8 (c), 20 (b) (ii), 22 and 29 of the NDPS Act which was read over and explained to them. As the accused pleaded not guilty to the charge and claimed to be tried, they were put to trial and tried in Sessions Case No.255 of 2002.

2.4. To prove the culpability of the accused, the prosecution has examined and relied upon the evidence of eight witnesses, details of which have been given in earlier part of para 2 of the impugned judgment and order.

2.5. To prove the case against the accused, the prosecution has also produced and relied upon a number of documents, details of which have been mentioned in later part of the paragraph 2 of the impugned judgment and order.

2.6. After recording of the evidence of the prosecution witnesses was over, the learned Judge of the trial Court explained to the accused the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement as required under Section 313 of the Code. In their further statement, the accused persons denied the case of the prosecution in toto. They, however, did not

lead any evidence nor did they examine any witness in support of their defence.

2.7. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the learned Judge of the trial court held that no contraband article was found from accused No.2 and it was therefore held that complicity of accused No.2 has not been proved by the prosecution and resultantly he acquitted accused No.2. However, he held that the contraband article charas was recovered from accused/appellant herein and the prosecution has been able to establish that P.W.2, complainant has followed necessary statutory provisions contained under sections 42, 43 and 50 of the NDPS Act. It is also held that complicity of accused/appellant herein for commission of the offences with which he was charged, has been proved beyond reasonable doubt, and therefore, he recorded the order of conviction and sentence against him to which reference is made in earlier

paragraph of this judgment, giving rise to instant appeal at the instance of the original accused No.1.

3. Mr. S.R. Divetia, learned advocate of the accused, has submitted that he does not challenge the impugned judgment and order passed by the learned Judge of the trial court so far as conviction of the accused for commission of the offences punishable under section 8 (c) read with section 20 (b) (ii) of the NDPS Act is concerned. However, according to him, so far as conviction recorded under section 22 of the NDPS Act is concerned, it is bad in law as it is not warranted. As per the prosecution case the accused was found with charas which is not a psychotropic substance. Section 22 provides for punishment for contravention in relation to psychotropic substances. Therefore, conviction recorded under section 22 of the NDPS Act against the accused deserves to be quashed and set aside.

3.1. So far as sentence awarded for commission of offence under section 20 (b) (ii) of the NDPS Act is concerned, according to him, it is harsh in view of the fact that the contraband article charas recovered from the accused was only 750 grams, which is less than commercial quantity. In spite of that, the learned Judge of the trial Court has imposed the maximum sentence on the accused. He has submitted that the accused is in jail since the date of his arrest i.e., 15.9.2002 and thus he has undergone imprisonment for more than four years as on today. He has further submitted that taking a liberal view, the imprisonment already undergone by the accused may be treated as substantive sentence for the offense proved against him. He, therefore, submitted that the sentence of ten years of RI and fine of Rs.50,000 imposed on the accused may be modified by holding that the period of imprisonment already undergone by the accused may be treated as substantive sentence and accordingly the appeal may be allowed.

4. Per contra, Mr. K.T. Dave, learned Additional P.P., has fairly conceded that so far as conviction under section 22 of the NDPS Act is concerned, the same deserves to be quashed and set aside by allowing the appeal to that extent as, according to him, the contraband article charas is not a psychotropic substance and, therefore, conviction of the accused under Section 22 of the NDPS Act is bad in law.

4.1. So far as sentence imposed upon the accused for commission of offence under Section 20 (b) (ii) of the NDPS Act is concerned, according to him, it is proportionate to the guilt of the accused because the charas recovered from him was weighing 750 grams and, therefore, no lenient view may be taken. He, therefore, urged to allow the appeal qua conviction under section 22 of the NDPS Act by quashing and setting aside the same and the appeal may be dismissed qua conviction under section 20 (b)

(ii) of the NDPS Act is concerned.

5. This Court has considered the submissions advanced by the learned advocates appearing for the parties and perused the impugned judgment and order. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read an re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of the caution sounded by the Supreme court while dealing with NDPS cases, this court has examined the entire evidence on record for itself independently of the learned Judge of the trial Court and considered the arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether the learned Judge of the trial Court has rightly recorded the order of conviction and sentence.

6. So far as the conviction recorded under Section 22 of the NDPS Act is concerned, according to this court, there is a lot of substance and force in the submission made by Mr. Divetia. Section 22 deals with punishment for contravention in relation to psychotropic substances. “Psychotropic substance” is defined in sub-section (xxiii) of section 2 of the NDPS Act. As per the said definition, “psychotropic substance” means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the schedule. A perusal of the schedule shows that 'charas' is not included therein. Therefore, framing of charge for commission of offense under section 22 of the NDPS Act itself is contrary to the provision of the NDPS Act from the inception. Therefore, conviction recorded against the accused for commission of offence under section 22 of the NDPS Act is against the statutory provisions

contained under the NDPS Act and deserves to be quashed and set aside by allowing the appeal qua recording conviction under section 22 of the NDPS Act.

7. There is no manner of doubt that a person indulging in the business of narcotic drugs is a menace to the society. He not only breaks the economy of the country but also substantially causes damage to the youth of the country and also deteriorates their health and, therefore, they become useless for society and the country. Therefore, to combat illicit drug traffic and drug abuse, both at the national and international levels, stringent punishment is provided under the NDPS Act. However, the parliament in its wisdom thought it fit that there should be rationalized sentencing structure depending upon the quantity of the contraband article i.e., narcotic substance recovered from the accused and, therefore, the parliament has enacted Narcotic Drugs and Psychotropic

Substances (Amendment) Act, 2001.

8. The accused is also convicted for commission of offense punishable under section 20 (b) (ii) of the NDPS Act. Section 20 (b) (ii) after amendment is as under:

> “(ii) where such contravention relates to sub-clause (b),--
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> (A) and involves small quantity, with rigorous imprisonment for term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;
>
> (B) and involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which my extend to ten years, and the fine which may extend to one lakh rupees;
>
> (C) and involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be

liable to fine which shall not be less than one lakh rupees and which may extend to two lakh rupees.

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

9. The chemical name of 'charas' is cannabis or cannabis resin and as per the table, so far as charas is concerned, small quantity specified is 100 grams whereas commercial quantity specified is 1 Kg. There is no manner of doubt that the quantity recovered from the possession of the accused was weighing 750 grams and thus the contraband article recovered from the accused was less than commercial quantity but greater than small quantity and therefore RI could have been extended upto ten years and fine could have been extended to Rs.1 lakh.

10. In instant case, the learned Judge of the trial Court, after hearing the accused and the

learned advocates appearing for the parties on the question of quantum of punishment, imposed sentence of R.I. for ten years and fine of Rs.50,000 i.d., R.I. for further period of 1 1/2 months. Therefore, the learned Judge of the trial court has imposed the maximum sentence in terms of clause Section 20 (b) (ii) (B) of the NDPS Act which is obviously harsh and disproportionate to the contraband article charas found from the possession of the accused.

11. Mr. Divetia, learned advocate of the accused, has submitted that there are mitigating circumstances to impose sentence of less than ten years. In this connection, he has submitted affidavit of Munni Rashidbhai Ansari, mother of the accused. In her affidavit, inter alia, she has stated the following:

> “1. I am the unfortunate mother of the present appellant-original accused No.1 Shahejad Rashidbhai Ansari. He is my only son. He has been in jail since 15.09.2002 as

an under-trial prisoner and convict. I have six daughters and they all are married.

2. I am widow woman. My husband has expired 8 years ago. I have been living alone in a hut in Sagran Maholla, Village Itava at Uttar Pradesh and maintain myself by begging as my only son has been in jail for last more than four years.

3. In the last days of my life, my son is the only support of mine. If leniency is not shown by this Hon'ble Court towards my son and if he could not live with me in the last days of my life, then it may happen that I may expire in absence of my only one son for want of my proper maintenance and medical treatment. For the sake of humanity, the leniency may be shown towards my son.

4. I have been maintaining myself by begging since many years and I am the victim of circumstances and really, a very poor widow who will not be in a position to pay even the token fine.

5. My only son has no criminal antecedents. He is really a very straight-forward boy, but anyhow, God knows why he is falsely implicated in this case and unfortunate to me, he is found guilty though innocent and I am deprived of the company of my only son who is the only support to mine and my only son is also deprived of my love and affection at the wish of the Almighty and I am completely helpless for such unfortunate happening.

6. For the sake of humanity, leniency may be shown towards my son so I may die in peace in presence of my only son at my native place at Uttar Pradesh.”

12. In the case of Balwinder Singh v. Assistant Commissioner, Customs and Central Excise, (2005) 4 SCC 146 the Supreme court has narrated the relevant factors to be considered for reduction of sentence for the offence under the NDPS Act. In the said case the accused was convicted of the offence under the NDPS Act for the first time

and, therefore, sentence was reduced from 14 years to ten years.

13. Applying the principles laid down by the Supreme Court in the above referred to judgment to the facts of the present case and also in light of the aforesaid statutory provisions contained under the NDPS (Amendment) Act, 2001, and the mitigating circumstances shown by the mother of the accused in her affidavit and also the accused was found in possession of contraband article charas weighing 750 grams which is approximately 250 grams lesser than the commercial quantity which is 1 Kg, we are of the opinion that the sentence of R.I. for ten years and fine of Rs.50,000 imposed on the accused by the learned Judge of the trial Court is required to be modified by reducing it to RI for 6 1/2 years instead of RI for ten years as imposed by the learned Judge of the trial Court and also by reducing the amount of fine to Rs.25,000/- instead of Rs.50,000/- as imposed by the learned

Judge of the trial Court and in default of payment of fine, the accused shall undergo R.I. for a further period of six months.

14. Seen in the above context, the conviction recorded against the accused for commission of the offence punishable under Section 22 (b) of the NDPS Act is quashed and set aside by allowing the appeal to that extent whereas while confirming the conviction for commission of the offence punishable under section 8 (c) read with section 20 (b) (ii) of the NDPS Act, this appeal deserves to be allowed qua sentence only.

15. For the foregoing reasons, the appeal succeeds in part and accordingly it is partly allowed. The conviction recorded against the accused for commission of the offence punishable under Section 22 (b) of the NDPS Act is quashed and set aside whereas while confirming the order of conviction recorded by the learned Judge of the trial Court against the accused for

commission of the offence punishable under Section 8 (c) read with Section 20 (b) (ii) of the NDPS Act, we modify the sentence by reducing it to R.I. for 6 1/2 years instead of R.I. for ten years as imposed by the learned Judge of the trial Court and also reduce the amount of fine to Rs.25,000/- instead of Rs.50,000/- as imposed by the learned Judge of the trial Court and i.d., the accused shall undergo R.I. for further period of 1 1/2 months.

The appeal is disposed of and is partly allowed as indicated herein above.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

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